The scope or the meaning to be given to the phrase 'unable to pay its debts' appearing in s 218(1)(e) of the Companies Act 1965 is explained by McPherson J in his book *The Law of Company Liquidation* (3rd Ed) at p 54 as follows:

> The phrase 'unable to pay its debts' is susceptible of two interpretations. One meaning which may properly be attached to it is that a company is unable to pay its debts if it is shown to be financially insolvent in the sense that its liabilities exceeds its assets. But to require proof of this in every case would impose upon an applicant the often near-impossible task of establishing the true financial position of the company, and the weight of authority undoubtedly supports the view that the primary meaning to the phrase is insolvency in the commercial sense — that is inability to meet current demands irrespective of whether the company is possessed of assets which, if realized, would enable it to discharge its liabilities in full.

That meaning has been accepted in the following cases (see *Re Sunshine Securities (Pte) Ltd*,[1] *Malayan Plant (Pte) Ltd* v *Moscow Narodny Bank Ltd*,[2] *Re Hong Huat Realty (M) Sdn Bhd*[3] and *Re Sanpete Builders (s) Pte Ltd*[4]).

As the test for the solvency of the respondent does not depend on the presence of their realizable assets, I had considered that the respondent had not given me any basis on which I could exercise my discretion to have the petition set aside. On that ground, I had dismissed their application and ordered that the respondent be wound up under the provisions of the Companies Act 1965, the official receiver be appointed provisional liquidator for the purpose of the said winding up and that the costs of the petition be taxed and paid to the petitioner by the liquidator out of the assets of the respondent.

Application dismissed.

Solicitors: *Lawrence & Joseph, Mahalingam & Co; Skrine & Co.*

Reported by *Zarinah Marican*

Lim Soo Seng v Majlis Perbandaran Pulau Pinang

HIGH COURT (PENANG) — CIVIL APPEAL NO 12-13-86
EDGAR JOSEPH JR J
11 AUGUST 1989

Contract — Employment — Implied term — Indemnity — Bus uninsured — Whether a servant can compel a reimbursement from the master

The appellant in this case was a bus driver employed by the respondents' predecessor-in-title. The appellant was involved in an accident wherein one Parvathy was injured. The appellant was driving the bus in the course of his employment at the material time and the bus was covered by the respondents' own insurance scheme. Parvathy sued the appellant for damages arising out of his negligent driving and judgment was entered for Parvathy with the appellant being held 50% liable. The appellant subsequently sued the respondent for reimbursement. In the court below, the learned magistrate found in favour of the respondent.

Held, allowing the appeal:
A term would be implied in the contract of service by the respondents as employers and the appellant as employee that the respondents would indemnify the appellant in cases of accident causing damage or injury to third parties arising from the negligent driving of their uninsured motor bus by the appellant.

[*Editorial Note*: The respondents have appealed to the Supreme Court vide Civil Appeal No 02-376 of 1989.]

Cases referred to
1 *Lister* v *Romford Ice and Cold Storage Co Ltd* [1957] 1 All ER 125 (not follid)
2 *Shirlaw* v *Southern Foundries (1926) Ltd* [1939] 2 KB 206 (refd)
3 *Morris* v *Ford Motor Co Ltd* [1973] QB 793 (refd)

RJ Manecksha for the appellant.
Ghazi bin Ishak for the respondents.

Cur Adv Vult

Edgar Joseph Jr J: This appeal raises a short but important point of law, namely, if through a servant's negligence in the driving of a motor vehicle in the course of his employment on the highway, a third party is injured and sues the servant alone and recovers damages, which the servant pays, may the servant in subsequent proceedings compel a reimbursement from the master? The learned magistrate who tried the case in the court below, answered this question in favour of the master, relying upon the majority judgment of the House of Lords in the case of *Lister* v *Romford Ice and Cold Storage Co Ltd*.[1] Before me, broadly and summarily stated, the question for decision is whether she was right in so holding.

The primary facts and the issue arising thereon were stated by the learned magistrate in the following terms:

> On 3 February 1974, the plaintiff then a bus driver employed by the defendants' predecessor-in-title, the Lembaga Pengu-

rus Kerajaan Tempatan (LPKT) was involved in an accident wherein one Parvathy was injured. The plaintiff was driving the bus in the course of his employment at the material time and the bus was covered by the defendants' own insurance scheme, as they were exempted from the provisions of s 74 of the Road Traffic Ordinance 1958.

Parvathy sued the plaintiff for damages arising out of his negligent driving in Sessions Court (c) 423/1978 and judgment was entered for Parvathy. Liability was apportioned at 50-50 — see judgment at p 15-18 of the agreed bundle P1. The defendants do not dispute that the sum claimed is due by the plaintiff to Parvathy.

The plaintiff pleads that, as he was driving the bus in the course of his employment and for the defendants' benefit, the defendants are vicariously liable to satisfy the judgment. He also avers that there is an implied term in his contract of service that the defendants should indemnify him 'in cases of accident and causing damage to third parties arising out of driving their uninsured buses' — see para 16 of the statement of claim.

I agreed with learned counsel for the defence that the question was not one of vicarious liability, but one of indemnity, ie whether the defendants are liable to indemnify the plaintiff in respect of the judgment.

In the *Lister* case,[1] an employer's insurer, having been called to pay damages to a workman who suffered personal injuries by reason of the negligent driving of a fellow servant who happened to be his own son, attempted to obtain reimbursement from the son by claiming against him in the name of the employers. In the Court of Appeal, except for Lord Denning, it was held by all the judges that, prima facie, an employer has the right to an indemnity which may be pursued by his insurers in the exercise of their rights of subrogation; but there was much more dispute over the applicability of this principle to the case of negligent driving. It was contended that a term ought to be implied in the contract of employment the effect of which was that the employer takes out the necessary insurance cover and the employee would not be accountable for any negligent driving. Lord Denning held that the risk of a servant's negligence should be borne by the insurance industry as a whole and put the case for the implied term aforesaid with great persuasiveness, and even Lord Simonds, often his judicial critic who took the contrary view when the case reached the House of Lords, acknowledged 'the force of the argument as presented by Lord Denning'. Nevertheless, the majority of the Court of Appeal and of the House of Lords rejected Lord Denning's argument.

Two factors which seem to suggest that Lord Denning (in the Court of Appeal) and Lord Radcliffe (who dissented in the House of Lords) did not subscribe to the prevailing orthodoxy in interpreting the judicial role in 1957 were their preference for principle rather than precedents and their willingness to take account of the need to keep the common law in step with changing social conditions.

Casting a retrospective glance, it seems startling that the case should have been decided as it was. From a practical stand point, it seems to me that Lord Denning was obviously right to use the much quoted official bystander test propounded by McKinnon LJ in *Shirlaw* v *Southern Foundries (1926) Ltd.*[2] Of course, it goes without saying, that a person employed as a driver expects his employers to look after the insurance, and would be absolutely aghast if told that the insurers could recover reimbursement from him for any damages they had to pay by reason of his negligence. A term to that effect could therefore be readily implied in the contract of service.

Indeed, in the House of Lords, in the *Lister* case,[1] Lord Radcliffe, dissenting, supported Lord Denning in emphatic terms as follows:

> My Lords, on this part of the case I take the same view as that taken by Denning LJ. I agree with what he says in his judgment ([1955] 3 All ER at p 467), and I do not think it possible to escape the force of his reasoning. If we assume any understanding between the appellant and the respondents as to insurance against third-party liability, to the appellant's inquiry as to who was to provide it, the respondents must have answered: 'We will see to that and the expense of providing it will fall on us'. But the result of this appeal depends on which of the following alternatives they must be taken to have added. One would be to this effect — 'but, of course, you understand that although we are going to secure the moneys required to pay the injured person in the first instance, you will have to make them good ultimately, either to us or to the insurance company'. The other would be — 'and, of course, it is understood that, since we are providing for the fund that will indemnify the injured person, that closes any question of our calling on you at any time to contribute to that fund'. I can only say that, to me, the first alternative seems a contradiction of what is involved in the respondents' understanding to pay for and provide the fund. The second seems to be the natural exchange to take place between the company and their lorry driver.
>
> I am, therefore, in favour of allowing the appeal.

In a subsequent case where similar issues were raised — *Morris* v *Ford Motor Co*[3] — it was held by a majority of the Court of Appeal that it was not open to insurers to pursue their rights of subrogation against an employee because of an implied term in the contract of employment; subrogation being an equitable right it could not be used where it was inequitable to do so. This is how Lord Denning put it at p 801:

> Every one knows that risks such as these are covered by insurance. So they should be, when a man is doing his employer's work, with his employer's plant and equipment, and happens to make a mistake. To make the servant personally liable would not only lead to a strike. It would be positively unjust. Its ill effects have been avoided only by an agreement between insurers not to enforce it. It should not be extended to this case. I would apply this simple principle: where the risk of a servant's negligence is covered by insurance, his employer should not seek to make that servant liable for it. At any rate, the courts should not compel him to allow his name to be used to do it.

Indeed, the *Lister* case[1] led to a departmental inquiry ending in the following conclusions (reproduced in the judgment of James LJ in the *Morris* case[3] at p 813) as follows:

> The decision in the *Lister* case shows that employers and their insurers have rights against employees which, if exploited unreasonably would endanger good industrial relations. We think that employers and insurers, if only in their own interests, will not so exploit their rights and the evidence we have received as to the action taken by the British Employers' Confederation and the insurance industry seems to us to support this view. We do not therefore think that the decision in the *Lister* case has exposed a practical problem or that there is any need for legislation at present. If in future it should appear that employers or insurers were exploiting their rights unreasonably, the problem would, we think, have to be reviewed; in that event further consideration might be given to the possible legislative measures which we have mentioned in our report and the various objections to them. Our conclusion does not, however, rule out any further efforts to deal with the matter by voluntary methods, such as an extension of the 'gentleman's agreement' within the insurance field, or by collective bargaining in any individual industry.

And, immediately after that, James LJ referred to the sequel to the report of the departmental enquiry, at pp 813-814, in these terms:

> The report and the conclusions of the committee were considered by the legislative committee of the British Insurance Association with the result that the association's then deputy chairman wrote a letter, dated 23 October 1959, to all members of the association. The letter is an agreed document in the present case. It appears from that piece of evidence that the BIA committee felt
>
> 'that insurers generally would agree that the common interest of all demands that, save possibly in case of collusion or wilful misconduct, no action should come before the courts which would redirect attention to the issues involved in *Lister*'s case.'
>
> The writer of the letter invited the addressees, in their common interest (a) to confirm adherence to a revised 'gentleman's agreement' as follows:
>
> 'Employer's Liability Insurers agree that they will not institute a claim against the employee of an insured employer in respect of death of or injury to a fellow-employee, unless the weight of evidence clearly indicates (1) collusion or (2) wilful misconduct, on the part of the employee against whom the claim is made. The agreement shall apply in priority to the provisions of any claims agreement operating between insurers who subscribe to this agreement.'

With respect, it seems to me that in the *Lister* case,[1] Lord Denning was clearly right and the majority wrong. His arguments based on policy considerations and the extent of the judicial role are irrefutable. The dispute concerned an area of judge-made law where judges are expected to pursue a course which leads to a result which is just and fair and this is precisely what he had done.

In all the circumstances, applying the officious bystander test and guided by the views of Lord Denning in the Court Appeal and those of the dissenting Laws Lords in *Lister*'s case,[1] I would imply a term in the contract of service entered into by the respondents as employers and the appellant as employee that the respondents would indemnify the appellant in cases of accident causing damage or injury to third parties arising out of the negligent driving of their uninsured motor bus by the appellant. It follows, therefore, that I would answer the question posed in the opening paragraph of this judgment in favour of the servant who is, of course, the appellant.

The result therefore is that this appeal is allowed, the judgment of the learned magistrate is set aside and there shall be substituted in place thereof, judgment for the appellant who was the plaintiff in the court below, in terms of the statement of claim. The respondents must also pay to the appellant the costs of the proceedings both here and in the court below. Deposit to be refunded to the appellant.

Finally, in view of my preference for the dissenting judgments in *Lister*'s case,[1] I shall be more than willing to grant leave to appeal to the Supreme Court in the event of an application for the same.

Appeal allowed.

Solicitors: *Triptipal Singh & Co; Presgrave & Matthews.*

Reported by *Kevin Mathews*